No. 80-195

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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

October Term, 1980

METROMEDIA, INC., et al.,

Appellants,

v.

CITY OF SAN DIEGO, et al.,

Appellees.

On Appeal From The Supreme Court Of California

MOTION TO DISMISS APPEAL

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MOTION TO DISMISS

Appellees move that that appeal herein taken be dismissed on the grounds that the appeal does not present a substantial federal question and that the decision below is obviously correct.

STATEMENT OF THE CASE

On March 14, 1972, the City Council of The City of San Diego adopted Ordinance No. 10795 (New Series) (Appellants' Appendix G), an ordinance prohibiting and abating, with enumerated exceptions, all off-site outdoor advertising display signs in the City of San Diego except for certain circumstances specified in subsection G of the ordinance. (Appellants' Appendix G 112a-113a.)

The types of signs excepted from the prohibition of the ordinance, in addition to various governmental, historical, religious, time and temperature, for sale, rent or lease, and signs being manufactured, include: bus bench signs, signs within malls, courts, arcades, etc., not visible from the boundary of the premises, signs on public transportation vehicles, signs on vehicles and trailers, temporary subdivision directional signs, and temporary political campaign signs. (Appellants' Appendix G 111a-112a.)

Ordinance No. 10795 (New Series) is contained in Chapter X ("Planning and Zoning") of the San Diego Municipal Code and recites as its purpose: to eliminate excessive and confusing signs

not related to the premises on which they are located; to eliminate hazards to pedestrians and motorists; to ensure signs are used as identification and not advertisement; to preserve and protect the appearance of the city; to protect the tourist industry by preventing the destruction of the natural beauty and environment of the city; to safeguard and enhance property values; and to protect public and private investment in buildings and open spaces. (Appellants' Appendix G 106a-107a.)

Appellants (hereinafter collectively referred to as "Metromedia") filed actions challenging the validity of the ordinance in the Superior Court against appellees (hereinafter collectively referred to as "City") soon after it was enacted.

The actions were consolidated and each side brought a motion for summary judgment against the other. In addition to a stipulation of facts, the City's motion was also based upon Metromedia's answers to interrogatories, matters subject to judicial notice and declarations pursuant to California law. (Clerk's Transcript, pp. 766-776, 1017-1024.)

The Superior Court denied City's motion for summary judgment and granted Metromedia's, declaring the ordinance invalid and enjoining City from enforcing it.

The California Supreme Court reversed the judgment of the trial court and upheld the ordinance as a proper application of municipal authority over zoning and land use for the purpose of promoting the public safety and welfare.

As to the traffic safety objectives sought to be achieved by the ordinance, the California Supreme Court stated: "We hold as a matter of law that an ordinance which eliminates billboards

designed to be viewed from streets and highways reasonably relates to traffic safety." (Appellants' Appendix A 7a.)

The decision below also rejected Metromedia's First Amendment attack on the ordinance as well as other asserted illegalities, but agreed with Metromedia in holding that the ordinance is partially preempted by state law as relates to removal of certain billboards with compensation.[1]

Because the ordinance does not define the term "outdoor advertising display signs" the decision below adopted a narrow construction of the signs proscribed by it by relying on a definition found in the California Revenue and Taxation Code as follows:

> . . . a rigidly assembled sign, display, or device permanently affixed to the ground or permanently attached to a building or other inherently permanent structure constituting, or used for the display of, a commercial or other advertisement to the public.
>
> Cal. Rev. & Tax. Code, § 18090.2.

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[1] City has filed a conditional petition for writ of certiorari to review this portion of the decision below which was based on provisions of a federal statute (23 U.S.C. § 131).

ARGUMENT

I

PRELIMINARY STATEMENT

When Medtromedia states that the subject ordinance prohibits all outdoor advertising within the City of San Diego it must be understood that such a statement is only accurate to the extent that "outdoor advertising" is intended to be limited to a particular type of off-site sign.

This is important because the term "outdoor advertising sign" is commonly used to denote a much broader category of signs.[2]

As stated above, the ordinance excludes many types of outdoor advertising signs from its prohibition.

Metromedia is incorrect in stating that Joint Stipulation of Facts No. 28 conclusively determines that adequate alternative means of expression are not available for many. That stipulation does not state that *all* other forms of advertising, including the exceptions enumerated by the ordinance, are unavailable or insufficient, inappropriate or prohibitively expensive.

Furthermore, subsequent to the parties entering into the stipulation of facts, the ordinance was amended to add the significant exception of temporary political campaign signs,

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[2] For example, under the California Outdoor Advertising Act it could include on-site signs. Cal. Bus. & Prof. Code, §§ 5226, 5202, 5203, 5221 and 5405.

thereby increasing the types of signs allowed. (Appellants' Appendix A 3a, n. 1.)[3]

Contrary to Metromedia's assertion, the record does not support the absence of any relationship between billboards and traffic safety.

Metromedia cites portions of the record relating to an answer to an interrogatory propounded by it to the City. The interrogatory asked for the names of every person known to the City who has suffered any physical injury as a result of the maintenance by Metromedia of signs in San Diego. City answered this interrogatory "unknown".

Metromedia conveniently ignores the subsequent subpart of the interrogatory which asked for the names of persons having any information which supports a contention that there is a causal relationship and the City's response giving names of such persons.

Obviously, the fact that San Diego was unaware at the time of answering an interrogatory of names of persons injured as a result of signs does not constitute "compelling evidence" of the absence of such a relationship.

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[3] While Metromedia attempts to rely on evidentiary matters outside of the record (Jurisdictional Statement, p. 18, footnote) to support its contention that alternative means of communication are more expensive, it is interesting to note that no costs are cited for many of the alternatives allowed by the ordinance, *e.g.*, bus bench signs, vehicle signs, leafleting, etc.

Metromedia also improperly argues that a temporary political campaign sign would cost $2,500 to $25,000, apparently relying on the stipulated figures for its signs, without any support in the record that a temporary sign would cost that much.

Furthermore, Metromedia conceded in answer to City's interrogatories that its signs are designed to, and do in fact attract the attention of motorists on public streets and highways. (Clerk's Transcript, pp. 145-146, 488-489.)

II

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

A. The Ordinance Does Not Violate The First Amendment

As stated by the decision below, the case of *Suffolk Outdoor Advertising Co. v. Hulse,* 43 N.Y.2d 483, 373 N.E.2d 263 (1977) upheld a community-wide ban on off-site billboards and this Court dismissed the appeal there for want of a substantial federal question. (439 U.S. 808.)

Metromedia apparently finds as a basis of distinguishing that case the size and nature of the cities involved. Metromedia must hold the belief that the First Amendment protection varies in proportion with the physical size or population of a city--a proposition for which no authority exists for obvious reasons.

Several other sign cases raising First Amendment issues have been dismissed on appeal by this Court for want of a substantial federal question. *Newman Signs, Inc. v. Hjelle,* 268 N.W.2d 741 (1978), 440 U.S. 901 (1979); *State of Washington v. Lotze,* 593 P.2d 811 (1979), 44 U.S. 921 (1979); *Stuckey's Stores, Inc. v. O'Cheskey,* 600 P.2d 258 (1979), ____ U.S. ____ (1980), 64 L.Ed.2d 783; *Veterans of Foreign Wars, Post 4264 v. City of Steamboat Springs,* 575 P.2d 835 (1978), 439 U.S. 809 (1978); *Modjeska Sign Studios v. Berle,* 373 N.E.2d 255 (1977), 439 U.S. 809 (1978).

Although some of these cases may be factually distinguishable, in that the ordinances are not identical to the ordinance here, they are based upon the same First Amendment analysis as in the decision below. They have held that such restrictions are valid time, place and manner of speech regulations because not based on the content of speech; they serve a significant governmental interest (traffic safety and aesthetics); they do not completely prevent dissemination by alternative means. Many of the cases cite the intrusive nature of billboards in their First Amendment analysis and the analysis is applied without distinction between commercial and political messages.[4]

This Court's decision in *Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975) does not refute the conclusion of the decision below, as well as that of other decisions that billboards are intrusive. The infirmity of the Jacksonville ordinance was that it was based on the *content* of films being shown at drive-in movies. This Court noted in *Erznoznik* that the drive-in movie theater was not trying to reach unwilling viewers and will presumedly be shielded where feasible from nonpaying customers.

Billboards, of course, are designed to catch the attention of motorists on the streets.

Nor is the recent case of *Central Hudson Gas & Electric Co. v. Public Service Commission,* 48 U.S.L.W. 4783 (June 20, 1980) inconsistent with the decision below. The regulation involved in *Central Hudson* was based on the particular content

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[4] Cases raising the issue of non-commercial speech are *State of Washington v. Lotze, supra,* and *Suffolk Outdoor Advertising Co. v. Hulse, supra.*

of information and prohibited its dissemination entirely. The analysis there is not applicable in the case at bench which is a time, place and manner regulation as opposed to a direct restriction of speech.

If anything, the *Central Hudson* case represents a lessening of the First Amendment's protection when applied to commercial speech by allowing the suppression of information when the four part test enunciated there can be met. (See Mr. Justice Blackman's concurring opinion.)

Metromedia argues that the ordinance discriminates based on content since it exempts on-site signs and others. There is nothing in the record to support a contention that certain signs are allowed because of content. Numerous bases in support of the exemptions were set forth in the briefs below in answer to Metromedia's argument that the ordinance violated equal protection of the laws. (See, *e.g.*, Appellants' Opening Brief, Court of Appeal, pp. 47-48.)

Nor have the cases agreed with the contention that a distinction between on-site and off-site signs violates the First Amendment because based on content. *State of Washington v. Lotze, supra*, 503 P.2d 811, appeal dismissed, 444 U.S. 921 (1979).[5]

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[5] See also *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 68 (1976), citing *Markham Advertising Co. v. State*, 73 Wash.2d 405, 439 P.2d 248 (1968) in note 30.

B. The Ordinance Is A Proper Exercise Of The Police Power

It is clear that an exercise of the police power may restrict the manner of engaging in a business as well as prohibit it altogether. *Nebbia v. New York,* 291 U.S. 502 (1933); *Goldblat v. Town of Hempstead,* 369 U.S. 590 (1962); *Consolidated Rock Products Co. v. City of Los Angeles,* 57 Cal.2d 515 (1962), dismissed, 371 U.S. 36 (1962).

Under the decision below, Metromedia may attack the amortization schedule as applied to any particular sign. (Appellants' Appendix A 44a, 47a.)

Metromedia is not prohibited from engaging in outdoor advertising in a form not prohibited by the ordinance.

CONCLUSION

City respectfully submits that there is no substantial federal question presented by this appeal and that the decision below is obviously correct. The appeal should therefore be dismissed.

Dated: September 9, 1980

Respectfully submitted,

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